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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 239

NORTON ANTHONY RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–3a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960. The petition for a writ of certiorari was filed on July 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who is indicted by a grand jury composed, in part, of government employees is entitled to dismissal of the indictment or a hearing

on the basis of general allegations that such grand jurors are biased in cases involving Communism.

2. Whether an indictment charging contempt of Congress must state the subject under inquiry and the relationship of the questions asked to that subject.

3. Whether petitioner stated his refusal to answer any question on Communism at the start of the hearing and therefore could not be tried for later refusing to answer specific questions on this subject.

4. Whether the trial court properly held that, as a matter of law, the subcommittee was properly constituted.

5. Whether the trial court erred (a) in holding, as matters of law, that the inquiry was for a legislative purpose and that the questions in issue were pertinent to that inquiry, or (b) in its instructions to the jury.

STATUTE INVOLVED

The statute involved is 2 U.S.C. 192, which appears at page 4 of the petition.

STATEMENT

Petitioner was indicted on sixteen counts, each of which charged him with refusing to answer a different question put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives (J.A. 3–6). He was convicted on counts 2, 3, and 4[1] (J.A. 236–237), and sentenced to

[1] The trial court directed acquittal on the remaining counts after they were abandoned by the government because the subcommittee failed to order petitioner to answer these other questions after his initial refusal to answer (J.A. 185, 220).

thirty days' imprisonment and a fine of five hundred dollars on each count, with the imprisonment sentences to run concurrently (J.A. 40). On appeal, petitioner's conviction was affirmed[1] (Pet. App. 1a–3a).

The pertinent facts may be summarized as follows:

Petitioner was called on September 15, 1954, before a subcommittee of the House Committee on Un-American Activities holding hearings in Dayton, Ohio, as part of their investigation into Communist activity in the Dayton area (J.A. 84–85).[2] Although the subcommittee conducting the Dayton hearings was composed of three members, only the chairman was present when petitioner appeared (J.A. 85, 149). Counsel for the subcommittee testified that petitioner was called, despite the fact that a quorum was not present and the subcommittee was not a validly operating subcommittee, because there was some prospect of petitioner's being a "cooperative" witness (J.A. 153).

Petitioner was not, however, such a witness. He claimed a First Amendment privilege when asked any questions relating to Communism and its specific activities then under investigation (J.A. 85–87). Upon the petitioner's refusal to answer such questions, counsel for the Committee excused the witness (J.A. 87–

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[1] The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases, until after the decision of this Court in *Barenblatt* v. *United States*, 360 U.S. 109. See the government's Br. in Opp. in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

[2] A full statement of the purposes of these hearings is provided in Government Exhibit 3, set forth at J.A. 51–57.

88). Though the witness was not kept under subpoena (J.A. 88), the intention of counsel was to report to the Committee the other questions to be asked petitioner and to ask for a decision as to whether or not petitioner should be recalled (J.A. 88).

Committee counsel thereafter reported to the Committee that he felt that petitioner had been influenced at Dayton by the fact that his appearance was not before a legally constituted subcommittee and that he might cooperate if called before the Committee in Washington (J.A. 158). Moreover, petitioner's refusal to testify left a void, or, as counsel for the Committee characterized it, a "missing link" (J.A. 157, 176) in the testimony received from other witnesses during the Dayton hearings (J.A. 157, 159–160). The testimony already received established two areas of Communist activity, the connection between which would provide a fuller explanation of the purposes and methods of the Communist Party (J.A. 158–161). Therefore, the Committee was particularly anxious to obtain the information which it felt petitioner could supply (J.A. 157, 172, 176, 178–179), and he was subpoenaed to appear in Washington on November 17, 1954 (J.A. 44, 117).

Petitioner testified at Washington during an afternoon session conducted by a three-man subcommittee (J.A. 118, 123) which had been appointed during the noon recess by the Committee chairman (J.A. 117–118, 120). Notice of the appointment, which the chairman had made by telephone (J.A. 120), was entered in the record of the hearings at the beginning of the session at which petitioner testified (J.A. 168;

G. Ex. 6), and announcement of this fact was made at the hearing (J.A. 168). At no time during the course of the hearing did petitioner object to the composition or appointment of the subcommittee before which he appeared (J.A. 169–185).

Petitioner was questioned concerning the activities about which he had been interrogated in Dayton (J.A. 169–185). He persisted in his refusal to answer the Committee counsel's questions concerning his knowledge of the Communist activities being investigated and invoked the First Amendment as to each such question (see, *e.g.*, J.A. 174, 177). The questions he refused to answer included whether he joined the Communist Party in the mid-nineteen-forties (count two) (J.A. 178–179); whether Herbert Reed had anything to do with his entering the party (count three) (J.A. 180); and whether he had any knowledge of a party group in Yellow Springs (count four) (J.A. 182–183). Despite explanation of the importance of his testimony in the investigation of Communist activities at Antioch College (J.A. 172–173, 176–180) and rejection of his legal position (J.A. 175, 181), petitioner continued his refusal to answer these questions after being urged (J.A. 175, 181) and, finally, directed (J.A. 179, 180, 183) to answer.

ARGUMENT

1. Petitioner claims (Pet. 14–15) that the indictment should have been dismissed due to the possible bias of thirteen members of the grand jury who were employees of the Federal Government or District of Columbia, or that a hearing should have been granted

on this issue.[4] This contention is without substance.

The grand jury is a purely accusatory body which does not decide the question of guilt or innocence, but merely whether the defendant should be remanded for trial. *Hale* v. *Henkel*, 201 U.S. 43, 65. This has led to the traditional and continued reluctance of the courts to scrutinize grand jury proceedings for at least two reasons. First, the defendant is guaranteed detailed and elaborate protection, both at the trial and appellate levels, as to the proceeding which determines his guilt or innocence. Second, if the courts allowed defendant to challenge various aspects of the grand jury's actions, the result would be a second elaborate proceeding—besides the trial itself—before guilt or innocence was actually determined. This would mean considerable delay and inefficiency in the administration of criminal law. See Swan, C. J., in *United States* v. *Remington*, 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907.[5]

Since the courts so rarely interfere with grand jury proceedings, the federal courts have held that bias in grand jurors does not invalidate an indictment unless, perhaps, the showing of bias in particular grand jurors is specific, individual, and strong. See, *e.g.*, *Cleveland* v. *United States*, 146 F. 2d 730, 732–733 (C.A. 10), affirmed, 329 U.S. 14; *United States* v.

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[4] Petitioner did not argue this issue in the court of appeals because of "the present state of the authorities in this Circuit" but purported to reserve the issue. The court did not advert to the question.

[5] These reasons are not applicable with regard to claims of bias in petit jurors. Therefore, *Morford* v. *United States*, 339 U.S. 258, and *Dennis* v. *United States*, 339 U.S. 162, on which petitioner relies (Pet. 14–15), do not sustain his position.

Remington, supra; Quinn v. *United States*, 203 F. 2d 20, 25 (C.A.D.C.), reversed on other grounds, 349 U.S. 155; *Emspak* v. *United States*, 203 F. 2d 54, 56, 58–60 (C.A.D.C.), reversed on other grounds, 349 U.S. 190; *United States* v. *Williams*, Fed. Cas. No. 16,716 (C.C.D. Minn.); *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D.N.Y.); *United States* v. *Smyth*, 104 F. Supp. 283, 300–301 (N.D. Calif.).* And in *Dennis* v. *United States*, 339 U.S. 162, 168, 172, this Court indicated that specific demonstration of bias and fear—not mere claims that the security program intimidated many government employees—was necessary before even a petit juror could be disqualified. Similarly, a defendant is not entitled to a hearing with respect to the grand jury unless, at the least, his motion and accompanying affidavit allege specific facts which, if proved, would constitute the strong showing of bias

* The decisions of this Court in which indictments have been invalidated for reasons relating to the composition of the grand jury have all involved the systematic exclusion from the panel of entire classes of persons, such as women (*Ballard* v. *United States*, 329 U.S. 187), and Negroes (*Cassell* v. *Texas*, 339 U.S. 282). These cases turn principally on the view that the grand juries chosen are unrepresentative of the community, and therefore are not proper grand juries. It is plain that it is not merely general prejudice against the accused's class that is involved, because the Court has chosen as its remedy not to require that all persons prejudiced against the class be excluded or even that the excluded class must be represented on every grand jury returning an indictment against a member of that class, but only to insure that the selection of the panels be without arbitrary exclusion. It has never been suggested by the Court that an accused might be entitled to have an entire class systematically excluded from the panel or a particular jury—the precise claim petitioner makes here.

necessary, at the least, for dismissal of the indictment. See *Quinn* v. *United States, supra; Emspak* v. *United States, supra.*

Under these standards of juror-bias (assuming that a grand jury can ever be challenged for bias), the allegations in the present record (J.A. 9–21) were clearly insufficient to warrant either dismissing the indictment or holding a hearing. The "proof" offered in support of the motion—which was substantially the same as that found insufficient in *Quinn* and *Emspak* to dismiss the indictment or require a hearing—amounted to no more than opinions (not factual evidence) that there existed among government employees *in general* such a "climate of fear" of loss of employment as security risks as to make it likely that any individual employee of the government would be afraid to vote against the return of an indictment in any case which was in any way connected with charges of Communism. But this is neither a showing of, nor an offer to show by proper evidence, specific individual bias in particular grand jurors which is the only kind of showing which could possibly suffice to invalidate an indictment.[1]

2. Petitioner attacks (Pet. 15–17) the indictment on the ground that it failed to state what subject was under inquiry and the relationship of the questions

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[1] Petitioner's suggestion (J.A. 19–21) that by calling the grand jurors themselves he will be able to show their particular bias and fear is obviously no more than a fishing expedition. His general claims certainly cannot give him the right to conduct a sweeping investigation into the attitudes and psychology of all the government-employee-jurors in the mere hope of finding something more definite. See *United States* v. *Smyth, supra*, 104 F. Supp. at 301.

asked to that inquiry. The indictment stated simply, in the words of the statute, that the defendant unlawfully refused to answer "questions which were pertinent to the question then under inquiry" (J.A. 3). This form of indictment has been upheld in other cases under the familiar principle that indictments in statutory language are ordinarily sufficient under Rule 7(c), F.R. Crim. P. *United States* v. *Josephson*, 165 F. 2d 82, 85 (C.A. 2), certiorari denied, 333 U.S. 838; *Barenblatt* v. *United States*, 240 F. 2d 875, 878 (C.A. D.C.), reversed on other grounds, 354 U.S. 930, and ultimately affirmed, 360 U.S. 109; *Sacher* v. *United States*, 252 F. 2d 828, 830–831 (C.A.D.C.), reversed on other grounds, 356 U.S. 576.[*]

Moreover, it is clear that petitioner was not compelled by the general allegation of the indictment to guess as to the subject under inquiry. He was given repeated and detailed explanations when he was questioned by the subcommittee in Washington (J.A. 172–173, 176, 178–180) that the subcommittee wanted to learn from him the extent and nature of Communist

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[*] Contrary to petitioner's assertion (Pet. 17), the decision below is not in conflict with *United States* v. *Lamont*, 236 F. 2d 312 (C.A. 2). There, the indictments were held defective not because they failed to specify the subject matter under inquiry but because it was clear, as a result of judicial notice, that the inquiry was outside the scope of the committee's authorizing resolution and hence its jurisdiction. The court of appeals specifically stated that "The result might well be different were this a case of a committee created by Congress to hold hearings for a specific purpose, with the inquiry in question apparently falling within the assigned purpose" (*id.* at 316, note 6). The court then cited the *Josephson* case, which, like the instant case and unlike *Lamont*, involved the House Committee on Un-American Activities.

activity at Antioch College. The subcommittee further described at considerable length how the questions he refused to answer related to this subject. And if petitioner was left in any doubt, he could easily have moved for a bill of particulars.

3. Petitioner argues (Pet. 4, 19) that, when a witness refuses at the outset to answer any questions on the subject of Communism, he may not be punished for subsequently refusing to answer specific questions on that subject. Regardless of the legal validity of this claim, the instant case is not one in which there was a refusal to answer all questions even on a particular subject. Rather, petitioner repeatedly invoked the First Amendment in response to particular questions but did not state that he would refuse to answer future questions (see, *e.g.*, J.A. 174, 177). In fact, petitioner answered questions concerning his acquaintance with prior witnesses as well as with Herbert Reed, who had been identified as a Communist Party organizer (J.A. 169-174). Thus petitioner's reliance (Pet. 19) on *United States* v. *Costello*, 198 F. 2d 200, 204 (C.A. 2), certiorari denied, 344 U.S. 874, is misplaced, for there the witness refused to answer any questions on a particular day and his contempt was total when he refused to testify at all.*

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*It is also important to note that *Costello*, unlike the instant case, concerns a situation where the witness was charged in separate counts with refusing to answer any questions and also with refusal to answer particular questions. The court of appeals emphasized that the committee could not multiply the contempt by continuing to ask questions after the witness had stated his refusal to answer all questions. Where the witness makes a total refusal to answer as well as specific refusals to

4. Petitioner claims (Pet. 3–4, 19) that the subcommittee before which he refused to testify was not properly constituted and that this issue should have been decided, not by the judge, but by the jury. But this contention is not available since he made no objection to the constitution of the subcommittee at the time he was called before it. *United States* v. *Bryan*, 339 U.S. 323, 330–335; *Emspak* v. *United States*, *supra*, 203 F. 2d at 56, reversed on other grounds, 349 U.S. 190. If petitioner had made at that time any of the objections he subsequently raised at his trial, they could easily have been satisfied by the Committee. "To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." *United States* v. *Bryan*, *supra*, 339 U.S. at 333.

In any event, the trial court's action was correct. The court concluded that the issues whether the Committee chairman could appoint subcommittees, and whether such appointment could be made by telephone, were questions of law (J.A. 204, 223–224). As observed by the court of appeals (Pet. App. 2), these were legal questions within the trial court's prerogative. The court properly left to the jury the only questions of fact: whether the subcommittee was in fact so appointed and was acting during petitioner's appearance (J.A. 226). The jury decided pursuant to these instructions that the subcommittee was properly

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answer particular questions, there seems no reason why he cannot be charged with contempt for at least one specific refusal to answer rather than with his total refusal.

constituted and this determination is amply supported by the evidence (see the Statement, *supra*, pp. 4–5)."[20]

As for the legal issues, the trial court properly ruled that the Committee chairman had the power to appoint subcommittees by telephone. A House committee may adopt rules, may appoint subcommittees, and may confer on them powers delegated to the Committee. Deschler, *Rules and Manual, United States House of Representatives* (H. Doc. 458, 85th Cong., 2d Sess.) § 735; I Hinds' *Precedents of the House of Representatives* (1907) § 707; III *id.* at §§ 1841, 1842; VI Cannon's *Precedents of the House of Representatives* (1936) § 532; VIII *id.* at § 2214. The Committee on Un-American Activities on January 22, 1953, passed a resolution authorizing its chairman to appoint subcommittees from time to time to perform the functions of the Committee (J.A. 190). There is no authority or reason requiring that such appointment take any particular form or include any specific formalities. See *Meyers* v. *United States*, 171 F. 2d 800, 811, (C.A.D.C.), certiorari denied, 336 U.S. 912.

5. Petitioner also contends (Pet. 17–19) that the court committed several errors during the course of the trial. First, he argues that the question of pertinency, which was decided by the court as a matter of law (J.A. 195, 224–225), should have been decided by the jury. This Court, however, has made clear that pertinency is a matter of law for the trial court.

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[20] Petitioner suggests (Pet. 12–13) that misleading evidence was introduced and that the trial judge did not exclude such evidence or give clarifying instructions. But petitioner did not object to this evidence at the trial (see, *e.g.*, J.A. 168) and the only instructions on this issue which he requested were given (J.A. 32–33, 226–227).

Sinclair v. *United States*, 279 U.S. 263; see *Bowers* v. *United States*, 202 F. 2d 447; *Kenney* v. *United States*, 218 F. 2d 843.[11] And the determination of the court that the questions were pertinent—which is clearly shown by the subcommittee's own explanation of the questions to petitioner (J.A. 172–174, 176, 178–182)—is not open to reasonable doubt.

Petitioner next contends that the trial court applied a conclusive presumption that petitioner was subpoenaed to testify in aid of a legislative purpose although the evidence showed that the purpose was to punish him for contempt.[12] The court, however, applied no presumption, but found as a matter of law that the inquiry was for a legislative purpose and so charged the jury (J.A. 225). This decision is fully supported by the evidence introduced at the trial that petitioner was called before the subcommittee a second time because the Committee thought that petitioner might well cooperate with a legally constituted subcommittee (the subcommittee before which he first appeared was not legally constituted) and because the Committee believed that his testimony would be of great importance to its investigation of Communism

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[11] While the holding of the court of appeals in *United States* v. *Orman*, 207 F. 2d 148, 155–156 (C.A. 3), on which petitioner relies (Pet. 17), is not altogether clear, it seems that the trial court left it to the jury to find the facts and instructed them that, if they found certain facts, the questions were pertinent as a matter of law. Certainly, the court did not purport to disregard the clear holding of this Court in the *Sinclair* case.

[12] Petitioner's argument goes to the method and correctness of the trial court's determination, not to whether the issue should have been decided by the court or the jury. The issue of legislative purpose has always been one for the court. See *Barenblatt* v. *United States*, *supra*, 360 U.S. at 127–133.

in the Dayton area (see the Statement, *supra*, p. 4). But even if the Committee believed that petitioner would continue to refuse to cooperate, it could properly call petitioner a second time in order to use its contempt power in an effort to compel him to answer. Cf. *Flaxer* v. *United States*, 358 U.S. 147, 151.

Further, petitioner contends that the court should have charged the jury that as between equal inferences of guilt or innocence they should draw the inference of innocence. But the court gave a sufficient and proper charge on the presumption of innocence and on the requirement that the government prove all elements of the offense beyond a reasonable doubt (J.A. 218, 233–234). As was stated in *Becher* v. *United States*, 5 F. 2d 45, 51 (C.A. 2), on which petitioner relies (Pet. 19), "It is enough if it appears that the jury has been told that the prosecution must establish all the facts to the required degree of satisfaction of the jury, and there is no fixed way in which this need be communicated, so long as that idea is evident." The Second Circuit therefore upheld the conviction in the *Becher* case even though the charge requested by petitioner here (J.A. 37) was not given.

6. Finally, petitioner suggests (Pet. 19–20) that the Committee's charter, H. Res. 5, 83d Cong., 1st Sess. (Rule XI of the House Rules), in conjunction with 2 U.S.C. 192, is so vague as to violate due process. The subcommittee, however, clearly explained to petitioner the subject matter under inquiry and the pertinency of the questions to this subject (J.A. 172–174, 176, 178–182). Thus, petitioner cannot claim that he has been hurt by any alleged lack of clarity

in the authorizing resolution. Moreover, petitioner's contention was considered at length in *Barenblatt* and specifically rejected. 360 U.S. at 116–123. While petitioner asks (Pet. 20) reconsideration of *Barenblatt*, a similar plea was denied in *Davis* v. *United States*, certiorari denied, 361 U.S. 919 (see Pet. in No. 456, 1959 Term), and no additional reason is presented in this case.[12]

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[12] Petitioner states (Pet. 20) that several of the issues raised in his petition are now before the Court in *McPhaul* v. *United States*, No. 33, this Term, certiorari granted, 362 U.S. 917; *Wilkinson* v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926; and *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960, and therefore suggests either that certiorari be granted in this case or at least that action on the petition be withheld until the decision of those cases. Although several of the issues are in fact common to this case and one or more of the three pending cases, we submit that the earlier cases do not provide any basis for asking this Court either to grant the writ or withhold action.

Four of the issues raised by petitioner—whether the indictment must specify the subject under inquiry and the pertinency of the questions, whether the question of pertinency should be decided by the jury, whether H. Res. 5 is unconstitutionally vague, and whether this Court should overrule its decision in *Barenblatt*—are also involved in *Braden*. But while we cannot, of course, be certain of the reasons why the Court granted certiorari in that case, we believe that these issues are without substance, being controlled by clear judicial precedent, and are distinctly subsidiary to the more serious issues involved in *Braden*. In addition, petitioner's contention that pertinency is a jury question has a distant relationship to the claims in the three pending cases that, in fact, the questions in those cases were not pertinent to the subject under inquiry. It is obvious, however, that the issues are different, the former involving a general question of law, the latter dependent on the particular facts of each case. And while petitioner's suggestion that legislative purpose and pertinency were lacking is related to similar contentions in the three pending cases, these claims depend on their own facts and their own records.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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